NO. 14-18-00600-CR

IN THE COURT OF APPEALS
FOR THE FOURTEENTH DISTRICT OF TEXAS

PHI VAN DO
Appellant

v.

THE STATE OF TEXAS
Appellee

On Appeal from Cause Number 2130699
From County Criminal Court at Law No. 10 of Harris County, Texas
Hon. Dan Spjut, Judge Presiding

APPELLANT'S REPLY BRIEF

ORAL ARGUMENT REQUESTED

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The undersigned attorney reiterates his request for oral argument.

ISSUES TO WHICH A REPLY IS MADE

Issue Number Three

Generally, DWI is a Class B misdemeanor. But DWI is a Class A misdemeanor if it is shown at trial that the defendant's alcohol concentration level was 0.15 or higher. Here, the question of whether Mr. Do's alcohol concentration level was 0.15 or higher was never submitted to the jury. Rather, the judge made such a finding during the trial's punishment phase. Did the court err in convicting Mr. Do of Class A misdemeanor DWI?

Issue Number Five

In determining conditions of community supervision, a judge shall consider the extent to which the conditions impact the defendant's ability to meet financial obligations. Here, the trial judge imposed several financial obligations on Mr. Do as conditions of community supervision. Nothing in the record shows the trial judge considered Mr. Do's ability to pay these obligations. Is Mr. Do obligated to pay these financial assessments?

ARGUMENT

Issue Number Three

Generally, DWI is a Class B misdemeanor. But DWI is a Class A misdemeanor if it is shown at trial that the defendant's alcohol concentration level was 0.15 or higher. Here, the question of whether Mr. Do's alcohol concentration level was 0.15 or higher was never submitted to the jury. Rather, the judge made such a finding during the trial's punishment phase. Did the court err in convicting Mr. Do of Class A misdemeanor DWI?

A. The State is correct. There is no sufficiency-of-the-evidence problem. But there still is a problem and the problem is of constitutional dimension.

The State recognizes that a defendant's heightened alcohol-concentration level (0.15 or higher) is an element of Class A misdemeanor DWI under Penal Code, Section 49.04(d).[1] The State also acknowledges that in a jury trial, this heightened alcohol-concentration level must be proved to the jury during the trial's guilt-innocence phase.[2] And the State further admits that in the case at bar, there was no such proof.[3] This lack of proof of an essential element of the crime is a problem.

But the State questions Mr. Do's characterization of this problem as a matter of evidentiary sufficiency.[4] "[T]he evidence at the guilt phase," the State says, "was plainly

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[1] State's Appellate Brief at 11.

[2] *Id.*

[3] *Id.*

[4] Mr. Do did describe the problem as one of evidentiary insufficiency:

> "[N]o person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt." Tex. Code Crim. Proc. art. 38.03. Every element of the offense of Class A misdemeanor DWI under Section 49.04(d) was not proven in this case. The jury was the factfinder and was never even asked to consider the existence of a necessary element of the offense. Thus, the jury never found the existence of an element of the offense. Specifically, the jury never found that Mr. Do's alcohol-concentration level was 0.15 or higher. Accordingly, the evidence is insufficient to sustain Mr. Do's conviction under Section 49.04(d).

sufficient to show that the appellant's alcohol concentration was greater than .15."[5] This is a logical statement. As the State points out, evidence was produced during the guilt-innocence phase of the trial that Mr. Do "blew a .194 on the Intoxilyzer."[6] Had the jury been asked whether Mr. Do's alcohol-concentration level was 0.15 or more, an affirmative answer would have been warranted. Clearly, sufficient evidence was produced that would have supported such a finding.

So the problem is not insufficient evidence to support a finding. The problem is that there was no finding at all. The jury was not even asked to determine whether Mr. Do's alcohol-concentration level was 0.15 or higher. This is a problem of constitutional dimension. "It is axiomatic that a conviction upon a charge not made or upon a charge not tried constitutes a denial of due process."[7]

Mr. Do was inaccurate in referring to the problem in this case as one of evidentiary insufficiency. As established in *Jackson v. Virginia,* evidence is sufficient to support a conviction if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."[8] The problem in this case is not the lack of sufficient evidence to support a finding that Mr. Do's alcohol-concentration level was

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Brief for Appellant at 42 (emphasis in original)(citation to Article 38.03 originally in footnote).
[5] State's Appellate Brief at 11.
[6] *Id.* at 6 (accurately citing to 3 R.R. at 62).
[7] *Jackson v. Virginia,* 443 U.S. 307, 314, 99 S.Ct. 2781, 2786, 81 L.Ed.2d 560 (1979) (citing *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S.Ct. 514, 517, 92 L.Ed.2d 644 (1948)).
[8] *Jackson v. Virginia,* 443 U.S. at 319.

0.15 or higher. Rather, the problem is that there was no such finding at all. And this is the main point of Mr. Do's third issue.

Mr. Do's third issue reads as follows:

> Generally, DWI is a Class B misdemeanor. But DWI is a Class A misdemeanor if it shown at trial that the defendant's alcohol concentration level was 0.15 or higher. Here, the question of whether Mr. Do's alcohol concentration level was 0.15 or higher was never submitted to the jury. Rather, the judge made such a finding during the trial's punishment phase. Did the Court err in convicting Mr. Do of a Class A misdemeanor DWI?

As can be seen, Mr. Do does not even mention sufficiency of the evidence in his phrasing of Issue Three. Rather, he focuses on the fact that the jury was never asked to determine whether Mr. Do's alcohol-concentration level was 0.15 or greater. In the paragraph of his brief in which he mentions insufficiency, Mr. Do is similarly focused:

> "[N]o person may be convicted of an offense unless each element of the offense is proven beyond a reasonable doubt." Tex. Code Crim. Proc. art. 38.03. Every element of the offense of Class A misdemeanor DWI under Section 49.04(d) was not proven in this case. The jury was the factfinder and was never even asked to consider the existence of a necessary element of the offense. Thus, the jury never found the existence of an element of the offense. Specifically, the jury never found that Mr. Do's alcohol-concentration level was 0.15 or higher. Accordingly, the evidence is insufficient to sustain Mr. Do's conviction under Section 49.04(d).[9]

Mr. Do's main point is encapsulated in the first sentence of the paragraph above. "No person may be convicted of an offense unless each element of the offense is

[9] Brief for Appellant at 42. This paragraph is also set out in Footnote 4 of this reply brief. It is reproduced here for ease of discussion.

proven beyond a reasonable doubt."[10] This sentence is a direct recitation of the pertinent text of Code of Criminal Procedure, Article 38.03. And the sentence is merely a restatement of the same principle recognized by the U.S. Supreme Court in *In re Winship*:

> [W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.[11]

The Supreme Court recently re-emphasized this idea in *Hurst v. Florida*:

> The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . . ." This right, in conjunction with the Due Process Clause, requires that each element of a crime be proved to a jury beyond a reasonable doubt."[12]

Plainly and simply, the problem in this case is the violation of Article 38.03 and the constitutional violations recognized in *Winship* and *Hurst*. Mr. Do's conviction for Class A misdemeanor DWI cannot stand because each element of the offense was not proven. Period. No harm analysis is required.

An explanation of why no harm analysis is required may be helpful here. When evidence is insufficient to support a jury's finding of an essential element of the charged

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[10] Brief for Appellant at 42.
[11] *In re Winship,* 397 U.S. 358, 364, 90 S.Ct. 1068, 1073, 25 L.Ed.2d 368 (1970)(emphasis added).
[12] *Hurst v. Florida,* 136 S.Ct. 616, 621, 193 L.Ed.2d 504 (2016) (emphasis added) (citing *Alleyne v. United States,* 570 U.S. 99, 104, 133 S.Ct. 2151, 2156, 186 L.Ed.2d 314 (2013)).

offense, a conviction for that offense cannot stand.[13] As recognized by our Court of Criminal Appeals, there are two possible outcomes when evidence is insufficient to support a conviction for a particular offense. First, the defendant can be acquitted. Second, in appropriate circumstances, the judgment may be reformed to reflect a verdict of guilty on a lesser-included offense:

> In *Bowen,* we held that a court of appeals, upon finding the evidence supporting a conviction to be legally insufficient, is not necessarily limited to ordering an acquittal, but may instead reform the judgment to reflect a verdict of guilty on a lesser-included offense—even when no lesser-included instruction was given at trial.[14]

There is, however, no option to conduct a harm analysis and uphold the conviction for the offense for which there is insufficient evidence.

In the case at bar, the evidence was not insufficient to support a finding that Mr. Do's alcohol-concentration level was 0.15 or higher. Rather, there was simply no such finding at all. But the result is the same as if the evidence were insufficient. Either way, all of the elements of Class A misdemeanor DWI were not proved.[15] And "no person

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[13] *See Gross v. State,* 380 S.W.3d 181, 183 (Tex. Crim. App. 2012) (affirming this Court's decision to render a judgment of acquittal because the evidence was insufficient to support a murder conviction); s*ee also United States v. Martin Linen Supply Co.,* 430 U.S. 564, 572, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977) (government failed to prove material allegations – *i.e.*, the evidence was insufficient to sustain a conviction – and the defendant was found not guilty); *State v. Moreno*, 294 S.W.3d 594, 599 (Tex. Crim. App. 2009) (describing the judge in the *Martin Linen Supply* case as having commented "that the Government failed to prove the elements of the offense").

[14] *Thornton v. State,* 425 S.W.3d 289, 294 (Tex. Crim. App. 2014) (citing *Bowen v. State,* 374 S.W.3d 427 (Tex, Crim. App. 2012)).

[15] This, of course, is a problem because "the State must prove each element of an offense beyond a reasonable doubt." *McQuarrie v. State,* 380 S.W.3d 145, 154 (Tex. Crim. App. 2012).

may be convicted of an offense unless each element of the offense is proved beyond a reasonable doubt."[16]

Mr. Do's assertion that his conviction for Class A misdemeanor DWI cannot stand is absolutely correct. His reasoning for the assertion – that there was no jury finding that his alcohol-concentration level was at least 0.15 – is spot on. His statement that the evidence was insufficient to support his conviction is inaccurate. But it is understandable. Whether the evidence is insufficient to support a jury finding or whether there was no such finding at all, the result is the same. Either way, Mr. Do's conviction for Class A misdemeanor DWI cannot stand. This is because the essential element of an alcohol-concentration level of 0.15 was not proved to the jury beyond a reasonable doubt.

B. Contrary to the State's argument, there is no jury-charge problem.

The State makes the following argument:

> The error in this case was not the State's failure to prove its allegation, but rather the trial court's failure to submit all the elements of the charged offense to the jury during the guilt phase.[17]

Mr. Do disagrees. The jury charge was entirely proper. It charged the offense of regular Class B misdemeanor DWI. This is exactly the offense that should have been

[16] Tex. Code Crim. Proc. art. 38.03.
[17] State's Appellate Brief at 12.

charged. The offense of Class A misdemeanor DWI should not have been charged even though this was the offense set out in the information. The reason that Class A misdemeanor DWI should not have been charged is that the State abandoned this offense during trial. An explanation of this abandonment follows below.

After the six members of the petit jury were sworn,[18] the trial judge gave the jurors various instructions.[19] The judge then invited the prosecutor to present the information by reading it aloud to the jury.[20] The prosecutor then read the charging instrument as follows:

> Comes now the undersigned Assistant District Attorney of Harris County, Texas on behalf of the State of Texas presents in and to the County Criminal Court at Law No. 10 of Harris County, Texas Phi Van Do, hereafter styled the Defendant, heretofore on or about January 9, 2017, did then and there unlawfully operate a motor vehicle in a public place while intoxicated.[21]

The judge asked Mr. Do how he would plead to the charge[22] and Mr. Do proceeded to plead not guilty.[23]

The point of reciting the foregoing facts is to show that the prosecutor read only the first paragraph of the information to the jury.[24] She did not read the second

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[18] 1 R.R. at 80.
[19] 1 R.R. at 81-83.
[20] 1 R.R. at 83.
[21] 1 R.R. at 83.
[22] 1 R.R. at 83.
[23] 1 R.R. at 84.
[24] See C.R. at 8 for the language of the information.

paragraph of the information to the jury.[25] The second paragraph, of course, was the part of the information alleging that Mr. Do's alcohol concentration level was at least 0.15.[26] This is a critical point.

The prosecutor's reading of the charging instrument is mandated by Article 36.01(a) of the Code of Criminal Procedure.[27] It is the first of several chronological events in a jury trial.[28] The second chronological event is the defendant's plea of not guilty.[29] The prosecutor's reading of the charging instrument and the defendant's entry of a not guilty plea at a trial's beginning is colloquially called an "arraignment."[30] But this is not legally correct terminology.[31] The reading of the indictment is simply the first step in a jury trial.[32] The defendant's entry of his or her plea is the second step.[33]

Regardless of the nomenclature, these first two steps are significant. The Court of Criminal Appeals has explained the reason for requiring the State to read the

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[25] *See id.*

[26] *See id.* The second paragraph of the information is as follows:

> It is further alleged that, at [sic] an analysis of a specimen of the defendant's BREATH showed an alcohol concentration level of at least 0.15 at the time the analysis was performed."

[27] Tex. Code Crim. Proc. Art. 36.01(a)(1); *See Warren v. State,* 693 S.W.2d 414, 415 (Tex. Crim. App. 1985).

[28] Tex. Code Crim. Proc. art. 36.01(a)(1).

[29] Tex. Code Crim. Proc. Art. 36.01(a)(2).

[30] *See Hinojosa v. State,* 788 S.W.2d 594, 599 (Tex. App.—Corpus Christi 1990, pet. ref'd).

[31] *See id.*

[32] *See id.* ("Appellant confuses the arraignment process with the first step in a criminal trial.); *see also Posey v. State.* 840 S.W.2d 34, 36 (Tex. App.—Dallas 1992, pet. ref'd) (contrasting an arraignment with the first step in a criminal trial).

[33] *See* Tex. Code Crim. Proc. Art. 36.01(b).

indictment before the jury. It is "to inform the accused of the charges against him and to inform the jury of the precise terms of the particular charge against the accused."[34] In fact, "[w]ithout the reading of the indictment and the entering of a plea, no issue is joined on which to try."[35]

The fact that the prosecutor did not read the second paragraph of the information to the jury in this case is of great consequence. By not reading the second paragraph, the prosecutor did not give Mr. Do notice that he was still being charged with Class A misdemeanor DWI. Thus, no issue between the State and Mr. Do was "joined" as to a Class A misdemeanor DWI charge.[36] The only "joined" issue between the State and Mr. Do was the regular Class B misdemeanor DWI charge.[37] It is the reading of the indictment and the plea thereto that makes an issue in a jury trial – not simply the indictment itself:

> The indictment is the basis for the prosecution. Among other things, its office is to inform the appellant of the charge laid against him, and one of the purposes of the requirement that it shall be read to the jury at the beginning of the prosecution is to inform them in precise terms of the particular charge laid against the defendant on trial. His plea thereto makes the issue.[38]

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[34] *Warren v. State,* 693 S.W.2d 414, 425 (1985). *See also Hinojosa v. State,* 788 S.W.2d at 599 ("The purpose of reading the accusation before the jury is to inform both the accused and the jury of the charge being brought against the accused."); *Lara v. State,* 740 S.W.2d 823, 828-29 (Tex. App.—Houston [1st Dist.] 1987, pet. ref'd) (one purpose of reading the indictment to the jury at the beginning of the prosecution is "to inform them of in precise terms of the particular charge laid against the defendant on trial").
[35] *Warren v. State,* 693 S.W.2d at 415.
[36] *See* text accompanying preceding footnote.
[37] *Id.*
[38] *Peltier v. State,* 626 S.W.2d 30, 31 (Tex. Crim. App. 1981).

By not reading the second paragraph, the State effectively abandoned that part of the information charging Mr. Do with Class A misdemeanor DWI.[39] The only charge brought against Mr. Do was for the offense of regular Class B misdemeanor DWI. Accordingly, the trial court acted properly in charging the jury with determining whether the elements of Class B misdemeanor DWI had been proved. It would have been an error to charge the jury with determining whether Mr. Do had an alcohol-concentration level of 0.15 or more. The State's contention that the trial court erred by not charging the jury on the heightened alcohol-concentration level is incorrect. There was no jury-charge error in this case.

C. While the trial court charged the jury properly, the court still made a mistake. That mistake occurred at the sentencing hearing.

Mr. Do opted to go to the judge for punishment.[40] At the outset of the punishment hearing, the following colloquy occurred:

> MR. CLEGGETT [Prosecutor]: At this time, the State would like to allege – further allege the .15 allegation. So it is fair to allege that an analysis of a specimen of the defendant's breath showed an alcohol concentration level of at least 0.15 at the time of the analysis was performed.
>
> THE COURT: Any objection from the defense?
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> MR HOPMANN [Defense Counsel]: Your Honor, that element was not presented to the jury for their consideration as part of deliberations. We

[39] "[T]he State can abandon an element of the charged offense without prior notice and proceed to prosecute a lesser-included offense." *Niles v. State,* 555 S.W.3d 562, 576 n. 8 (Tex. Crim. App. 2018) (Yeary, J., dissenting) (directly quoting from *Grey v. State,* 298 S.W.3d 644, 650 (Tex. Crim. App. 2009)).
[40] C.R. at 94; 4 R.R. at 4.

> would object to the enhanced element at this time. They tried it as a loss of use case.
>
> THE COURT: Any response?
>
> MR. CLEGGETT: The response from the State is that it's a punishment element. It wasn't an element of the actual offense. We did have evidence that the analysis of the breath was above a .15. We tried it as – all three were able to prove intoxication and the BAC actually came out at trial.
>
> THE COURT: The objection is overruled. The Court finds the enhancement to be true.

As the foregoing conversation shows, the trial judge treated the question of whether Mr. Do's alcohol-concentration level was at least 0.15 as a punishment enhancement. This was an error. The question of whether a defendant's alcohol-concentration level is at least 0.15 is an element of Class A misdemeanor DWI.[41] And that element is to be proved to the jury at the guilt-innocence phase of trial.[42] The State does not disagree.[43]

The trial judge should have sustained the defense counsel's objection and not considered the question of whether Mr. Do had a heightened alcohol-concentration level. The judge's overruling of the objection led to the further problem of convicting Mr. Do of Class A misdemeanor DWI. And that led to still another problem – the sentencing of Mr. Do in accord with the punishment for a Class A misdemeanor. The

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[41] *Navarro v. State,* 469 S.W.3d 687, 696 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd).
[42] *Id.*
[43] *See* State's Appellate Brief at 11.

judge sentenced Mr. Do to one year in jail.[44] While this is an appropriate sentence for a Class A misdemeanor, it is not an appropriate sentence for a Class B misdemeanor.[45]

In summary, the trial court handled the guilt-innocence phase of the trial correctly and submitted a correct jury charge. But the punishment phase of the trial was mishandled. The result was that Mr. Do was convicted of a Class A misdemeanor when he should only have been convicted of a Class B misdemeanor. Additionally, Mr. Do was punished for a Class A misdemeanor when he should only have been punished for a Class B misdemeanor.

For the reasons expressed in his original brief, this Court should remand this case to the trial court. The trial court should be instructed to reform the judgment to reflect a conviction for the offense of regular Class B misdemeanor DWI. The trial court should also be instructed to hold a new punishment hearing.

[44] 4 R.R. at 6.

[45] *See* Tex. Penal Code § 12.21 (maximum jail confinement of one year for a Class A misdemeanor) and § 12.22 (maximum jail confinement of 180 days for a Class B misdemeanor).

Issue Number Five

In determining conditions of community supervision, a judge shall consider the extent to which the conditions impact the defendant's ability to meet financial obligations. Here, the trial judge imposed several financial obligations on Mr. Do as conditions of community supervision. Nothing in the record shows the trial judge considered Mr. Do's ability to pay these obligations. Is Mr. Do obligated to pay these financial assessments?

Two arguments made by the State in regard to this issue warrant a response.

First, the State says "the record is silent as to whether the trial court actually conducted the inquiry that he [Mr. Do] says is required."[46] The State suggests that perhaps an ability-to-pay-inquiry was undertaken in some sort of off-the-record proceeding.[47] This is a rather far-fetched idea.

The punishment phase of trial was recorded by a court reporter and is set out in its entirety in Volume 4 of the Reporter's Record. The proceeding is short – it consists of just over three pages of testimony.[48] Near the beginning of the hearing, the trial judge says "we're here for sentencing."[49] And at the end of the hearing, after announcing Mr. Do's sentence, the following conversation took place:

THE COURT: Anything else from anyone?

MR. CLEGGETT [Prosecutor]: Nothing further from the State, your Honor.

[46] State's Appellate Brief at 18.
[47] *Id.* at 18-19.
[48] *See* 4 C.R. at 4-7.
[49] 4 C.R. at 4.

> MR. HOPMANN [Defense Counsel]: Nothing from the defense at this time, your Honor.
>
> THE COURT: All right. We're off the record.

As the record shows, the sentencing hearing came to an end. The State's suggestion that perhaps there was some other off-the-record ability-to-pay inquiry is a stretch. Judges are directed to conduct the ability-to-pay inquiry required by Article 42.15(a-1) "during or immediately after imposing a sentence."[50] Volume 4 of the Clerk's Record contains the entire sentencing hearing. No ability-to-pay inquiry was conducted. It defies common sense to think that immediately after both counselors said they had "nothing" more to say, the court conducted an ability-to-pay inquiry.

Second, Mr. Do is not complaining about the conditions of his community supervision. Rather, he is complaining about the trial court's failure to conduct an ability-to-pay hearing. As his original brief shows, Mr. Do is not asking this Court to invalidate any of his conditions of community supervision.[51] Nor is Mr. Do asking this Court to invalidate any of the court costs assessed against him.[52] Rather, Mr. Do is "ask[ing] this Court to remand the case to the trial court so the judge may perform the

[50] Tex. Code Crim. Proc, art. 42.15(a-1).
[51] *See* Brief for Appellant at 58.
[52] *See id.*

statutorily-required ability-to-pay-inquiry."[53] The *Speth* case does not foreclose Mr. Do from making this request.[54]

Mr. Do simply asks this Court to require the trial court to take the actions the Legislature has mandated. This should not be too much to ask.

[53] *See id.*
[54] *See Speth v. State,* 6 S.W.3d 530, 534 (Tex. Crim. App. 1999).

PRAYER

Mr. Do reiterates the prayer set out in his original brief.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on March 1, 2019, I provided this brief to the Harris County District Attorney via the EFILETEXAS.gov e-filing system. Specifically, this brief was electronically served on Assistant District Attorney Clint Morgan. This certification is required by the Texas Rules of Appellate Procedure.[55]

/s/ Ted Wood
TED WOOD
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Attorney for Appellant

[55] *See* Tex. R. App. P. 9.5.

CERTIFICATE OF COMPLIANCE

As required by the Texas Rules of Appellate Procedure,[56] I certify that this brief contains 3,918 words. This word-count is calculated by the Microsoft Word program used to prepare this brief. The word-count does not include those portions of the brief exempted from the word-count requirement.[57] The number of words permitted for this type of computer-generated brief (a reply brief in an appellate court) is 7,500.[58]

/s/ Ted Wood
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Attorney for Appellant

[56] Tex. R. App. P. 9.4(i)(3).
[57] *See* Tex. R. App. P. 9.4(i)(1).
[58] Tex. R. App. P. 9.4(i)(2)(C).